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IN THE

Supreme Court of the United States

October Term, 1967
No. 1060

ARTHUR V. JONES,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari Directed to the Court of Appeal, Fourth District, State of California From Judgment of Superior Court of Orange County, California and for Release on Own Recognizance or Bail Pending Appeal.

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To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Arthur V. Jones, an attorney of Santa Ana, Orange County, respectfully petitions this Honorable Court for a writ of certiorari directed to the Court of Appeal, Fourth Appellate District, State of California, to review and reverse a conviction and sentence to state prison of petitioner for alleged subornation of perjury growing out of the civil trial and for bail pending appeal. During the trial the procedure and proceedings were challenged as violative of the 5th and 14th Amendments U.S. Constitution and the Federal Communications Act, Sec. 605 [R. 368-413].

Petitioner, during the trial period, was on his own recognizance and obeyed and responded to all orders of the court and was only committed to jail and prison when the remittitur of the Supreme Court of the State of California was returned to the Superior Court of Orange County.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257, U.S. Codes, by the Fourth Amendment and Fifth and 14th Amendments to the Constitution of the United States and the Federal Communications Act, 47 U.S.C. Sec. 605. The California trial and appellate courts implicitly overruled petitioner's claim of violation of his federal Constitutional and Statutory rights.

The opinion of the Court of Appeal, Fourth Appellate District, Second Division, State of California, was rendered September 7, 1967 (4th Crim. No. 2726). A petition for rehearing was duly filed and denied October 5, 1967. A petition for hearing was duly filed in the Supreme Court of California on October 18, 1967 and denied November 1, 1967. This petition is being filed within 90 days thereof.

Application for release on bail was duly made in the Superior Court on December 18, 1967 and again in the Court of Appeal, Fourth Appellate District, Second Division, State of California, and denied on that date.

Statutes Involved.

The following statutes, which are contained in the Appendix hereto, are involved: the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States; Sections 653i and 653j (a), (c), (d) and

(h), Penal Code of California; and Sections 126, 127 and 132 Penal Code of California.

Opinion Below.

The opinion below is reported in 254 A.C.A 218 and is contained in the Appendix hereto.

The Facts.

This case involves the misuse of "eavesdropping" testimony and use of telephone tape recordings in violation of the law as set down by this Court in *Berger v. New York,* 388 U.S. 41, 18 L. ed. 2d 1040, and in violation of *Massiah v. United States,* 377 U.S. 201, 12 L. ed. 2d 246 [Exs. 9-10, R. 368-369 *et seq.,* 412].

Your petitioner is a veteran attorney who has been a member of the California Bar for 35 years and whose conduct has never heretofore been questioned. The criminal prosecution had its inception in two civil suits tried before a jury, *Boothe v. Kachig* and *Franklin v. Kachig,* which actions were consolidated for trial in the Superior Court of Orange County and involved the exchange of two parcels of real estate. Boothe sued Kachig for breach of contract in failing to consummate the exchange. Franklin sued Kachig for the purpose of recovering a real estate broker's commission. Petitioner herein, a duly licensed attorney of many years, represented both plaintiffs in the consolidated action.

In the course of preparing for trial, Boothe visited petitioner's office. Petitioner explained to Boothe that his lawsuit had a weakness in it, as the date of possession—July 1 or July 31—was in dispute. Petitioner allegedly handed Boothe a letter dated April 22,

1962, which related to the transaction and date and requested Boothe to sign it, which Boothe said he did.

At the time of the transaction involved, petitioner had a legal secretary named Mary Voeth. At the time of the investigation of the offense and the telephone conversations used to convey petitioner she was no longer employed by him [R. 325].

An exchange of properties was involved. The transfer of title and possession was to take place on July 1, 1962. Boothe, one of the parties to the agreement was alleged to have placed a "3" in front of the "1" and initialed it. Kachig did not agree to the changed date.

Judgment was rendered against Kachig, in favor of the broker Franklin for $10,000. Boothe received only nominal damages of $100. Followng the two judgments Kachig visited the court clerk's office and examined the type on the letter and then commenced an inquiry as to the dates contained in the letter and took the matter up with the District Attorney's office which assigned an investigator. He visited and questioned Jones former secretary, inferring that she might be in trouble.

Petitioner thereafter contacted his former legal secretary, Mary Voeth, about the matter and asked her if she remembered the letter. She indicated that the names rang a bell but did not recall ever having seen a carbon copy of it. Following this initial conversation, petitioner in October brought a large box of shorthand pads to Mary's apartment to examine the pads and thereafter, on November 2, Mary had a conversation on the telephone which she recorded in violation of Sections 653i and 653j of the California Penal Code. The telephone conversation was to be confidential.

On November 18 Mary had another telephone conversation with petitioner and the District Attorney's investigator was present on the latter date and a tape recording was made at his suggestion and with government equipment of the telephone conversation. It does not appear that he received consent of his superior or a court. No judicial officer interposed (*Katz v. U.S.*, 19 L. Ed. 2d 576, 585; *Wong Sun v. U.S.*, 371 U.S. 471, 481-2). In one recorded conversation petitioner allegedly stated that a paper company had switched paper in 1962 but that he was all right after the switch and nobody could say that the letter was not written on April 22, 1962. Another tape recording of a telephone conversation was to the effect that the District Attorney's investigator was coming to see her that very day and petitioner suggested that she tell the investigator she knew nothing about the matter. Petitioner had no conversations about the pads and he indicated he couldn't talk on the telephone and finally he agreed to go to a public telephone and call her back, which he promptly did. According to the recording, he again suggested that she destroy the notebook.

Both the tape recordings [Exs. 9-10, R. 368-369 *et seq.* 412] were introduced in evidence over the objections that they were violative of the Fourth and Fourteenth Amendment to the Constitution of the United States and the Federal Communications Act, 47 U.S.C. 605, and that the use of these recordings was the use of petitioner's own testimony against him without having any attorney present or to advise him, which therefore was in violation of the *Massiah* case doctrine (377 U.S. 201). The trial court overruled the objections and admitted the recordings and admitted the testimony

of both Mary Voeth and the investigator, and the tape recordings Exhibits 9 and 10.

On the basis of this testimony and the use of this illegally searched and secured evidence, petitioner was convicted of violations in Counts II and IV of the indictment, Count II charging subornation of perjury and Count IV offering false evidence. Co-defendants were acquitted.

An appeal was duly taken to the Court of Appeal, Fourth Appellate District of the State of California, which affirmed the judgment below and petition for hearing in the Supreme Court was denied. California thus implicitly overruled the objections that the evidence was used in violation of the Constitutional rights under the federal constitution of the petitioner, and the Federal Communications Act, Title 47, Sec. 605.

Questions Presented by This Writ.

1. Whether the use in evidence in a state trial of the taped recordings of a telephone conversation by a former legal secretary who was being threatened with possible criminal prosecution violated defendant's constitutional rights under the 4th, 5th and 14th Amendments United States Constitution and Section 605 of the Federal Communications Act, and this court's decision in *Massiah v. U.S.*, 377 U.S. 201, and *Berger v. U.S.*, 388 U.S. 41 and *Katz v. U.S.*, 19 L. Ed. 2d 576.

2. Whether the use in evidence of a recording of a telephone conversation by a district attorney's investigator without the consent of petitioner, violated petitioner's rights under the Fourth, Fifth and Fourteenth Amendments United States Constitution and Federal Communications Act, Sec. 605 and *Massiah v. U.S.*

377 U.S. 201 and *Berger v. U.S.*, 388 U.S. 41, *Katz v. U.S.*, 19 L. Ed. 576.

3. Whether the use of petitioner's own words to convict him, without warning, violated the rule of this court in *Massiah v. U.S.*, 377 U.S. 201, 12 L. Ed. 2d 246 and the Fifth Amendment United States Constitution. *Griffin v. California,* 380 U.S. 609.

4. Whether petitioner was denied his right to counsel in violation of the Fifth and Sixth and Fourteenth Amendments, United States Constitution, *Massiah v. U.S.*, 377 U.S. 201.

Petitioner prays that the writ be granted and that judgment be reversed and that he be released on his own recognizance or on reasonable bail pending the hearing and determination of his cause.

Respectfully submitted,

MORRIS LAVINE, ESQ.,
Attorney for Petitioner.